Before the
Federal Trade Commission
Washington, D.C. 20580

FTC-2023-0007-0001
NOTICE OF PROPOSED RULEMAKING

COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS

April 19, 2023

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I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (NAB)[1] hereby submits comments in response to the Federal Trade Commission's Notice of Proposed Rulemaking (NPRM) proposing a new non-compete clause rule.[2] The NPRM essentially proposes to ban the inclusion of non-compete clauses in employment contracts, with no exceptions. NAB respectfully submits this approach is overbroad, unreasonable, and contrary to law. In addition to being outside the bounds of the FTC's statutory authority, the proposal would grossly contradict a long tradition of analyzing non-compete provisions on a case-by-case basis according to a reasonableness standard.

We urge the Commission to take a more measured approach in this proceeding by making an exception for reasonable non-compete provisions to protect the unique

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[1] The National Association of Broadcasters (NAB) is the nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

[2] *Non-Compete Clause Rule*, Notice of Proposed Rulemaking, RIN 3084-AB74, FTC-2023-0007-0001 (Jan. 5, 2023) (NPRM).

investments broadcasters make in promoting their on-air talent. Broadcasters invest heavily in promoting their on-air employees as a station's brand, and can only reasonably make such an important investment with the understanding that the resulting brand will not be watered-down or confused with competitors. Accordingly, the Commission should consider an exception to an outright ban on non-compete clauses for broadcasters' contracts with their on-air talent.

To the extent that the FTC moves forward with its proposed ban on non-compete clauses generally, NAB also urges the Commission to adopt exceptions for broadcast executives and highly compensated staff, as the policy considerations the FTC cites to eliminate such provisions simply do not apply to the broadcast industry. The FTC must also clarify its proposal to ensure that it does not capture other valid contractual clauses and applies only to contracts entered into after the effective date. Finally, the Commission should provide employers with more time to comply with the rule's requirements.

II. IF THE FTC PROHIBITS OR RESTRICTS NON-COMPETE CLAUSES IT SHOULD INCLUDE AN EXCEPTION FOR ON-AIR TALENT

A. Broadcasters Make Significant Investments in On-Air Talent

Non-compete provisions are a critical tool broadcasters employ to permit them to invest substantially in on-air talent for news, sports, weather, and other programming. Broadcasters heavily promote their on-air talent, both in broadcast advertisements and in other media, such as billboards, signs, and social media. These investments are not only essential to developing a broadcaster's brand in this highly competitive environment, but they also benefit the employee by raising their profile and generating substantial goodwill in the market.

Investment in promoting talent, and in particular in building trust in talent, is critical to creating and maintaining a station's brand. This process benefits both the station and the

employee, as the station strengths its brand while promoting its lead talent. As a result, on-air talent becomes inextricably intertwined with the stations' brand, representing the public face of a radio or television station to viewers and listeners. If a station heavily promotes its on-air talent only to have that talent move immediately to a competing station in the same market, the competing station can capitalize instantly on the original station's investment in its promotion of the on-air talent to draw away audiences and advertising dollars and create brand confusion to the detriment of the original station.

The investment at issue is not trivial and is unique to the broadcast industry. Television stations may spend millions of dollars per year promoting their on-air talent. These investments come in the form of broadcast advertising inventory that could otherwise be sold to advertisers, as well as promotional dollars spent in other media. For example, one television station in a top-ten market spent over $9 million promoting its talent in 2022 – including $7 million in on-air advertising as well as more than $2 million in outside media. Nor are these investments confined to the largest markets. Another television station in a market outside the top-fifty spent more than $2.5 million promoting on-air talent in 2022, including approximately $2.2 million in on-air advertising and more than $300,000 in outside media. Radio stations similarly may spend hundreds of thousands of dollars, or even millions in some cases, promoting key talent. These expenditures are typically ongoing over the course of an on-air employee's time at a particular station.

To be clear, these efforts are not mere attempts to capitalize on a person's celebrity. Rather, promotion of on-air talent is designed to increase the public's trust in the person or people from whom their news is delivered. Trust is everything in the local news business, and stations work hard to develop that brand of trust by enhancing the reputations of their on-air talent. If a competing station were simply able to hire away an employee the original station

spent time, effort, and expense demonstrating was capable and trustworthy, that significantly harms the station losing the employee and discourages these important brand investments in the future.

B. Broadcasters Cannot Protect Their Interests Through Other Means

Significantly, broadcasters' interest in preserving the goodwill they have built up over the course of a contract by promoting and advertising their on-air talent is not protectable by other means the NPRM offers. For example, the NPRM suggests that employers may protect their investments in trade secrets and confidential business information with nondisclosure agreements. It is certainly the case that employers, including broadcasters, may have material interests in confidential or trade secret information that could be protected by NDAs. But such agreements offer stations no ability to safeguard their substantial investment in creating and maintaining goodwill by promoting their on-air talent.

The NPRM also suggests that employers can protect their investment in facilities or training for employees by offering employment contracts that are sufficiently long to allow the employer to recoup the value of those investments, but that do not restrict the worker's ability to compete after the worker's employment ends.[3] This too is inadequate for protecting broadcasters' investment in promoting their on-air talent. Unlike training or other investments that are one-time or time-limited, a broadcaster's investment in promoting their talent is ongoing, such that the investment cannot be easily recouped by establishing a sufficiently long term of employment. Moreover, the potential harm from a station's on-air talent moving to a direct competitor easily extends past the term of employment, as viewers and listeners

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[3] *Id.* at 99-100.

can be confused if an anchor, meteorologist, or sports reporter is promoted on Station A one week and suddenly appears on Station B the following week.

C. Non-Compete Provisions Are Reasonable Protections for Broadcast Stations' Investments in Their Employees

Courts have recognized broadcasters have a legitimate interest in protecting their promotional investments in on-air talent, and in protecting their brand due to the unique identity between the talent and the brand of a broadcast station that warrant the protection of a reasonable noncompete clause. In particular, because of the nature of broadcasting itself, where viewers and listeners hear from the station through individual announcers, "to the casual listener, the only personal means of identifying the broadcaster (and its advertisers) is through the announcer."[4] Stations thus invest in the promotion of on-air talent specifically to help build goodwill in their market.

For this reason, non-compete provisions for on-air talent are analogous to situations the FTC cites as reasonable uses of such provisions in the NPRM. In particular, the NPRM proposes an exemption for non-compete clauses between the buyer and the seller of a business because non-competes between the buyer and the seller may help protect the value of the business.[5] Where a station has made significant promotional investments in an employee to build goodwill in a particular market, it is reasonable for a station to protect that investment through a non-compete clause that requires a limited cooling off period before the employee goes to work in an on-air capacity for a competitor in the same market. Essentially, a reasonable non-compete period allows a broadcaster to preserve the goodwill and value of its brand that it has created through the promotion of its on-air talent.

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[4] *Cullman Broadcasting Co., Inc. v. Bosley*, 373 So. 2d 830 (Ala. 1979).

[5] NPRM at 129.

Critically, intervention by the Commission is not necessary to prohibit unreasonably broad or restrictive non-compete provisions. Non-compete clauses are *already* evaluated by a reasonableness standard in a fact specific inquiry that turns on the precise terms of the contract. Such terms may include the amount of time, geographic scope, and the specific activities prohibited under a specific non-compete clause. These limits would continue to apply to non-compete clauses broadcasters include in their contracts with on-air talent, just as they do today. And, courts would presumably continue to decline to enforce those clauses if they were unreasonable in any or all of these respects.

For example, a broadcaster's use of a non-compete provision was found to be unenforceable when an on-air personality left a station in one market, went to a station in a different market, and returned to the original market three years later.[6] Similarly, a broadcaster's non-compete provision was found unenforceable where a radio announcer moved to another station but assumed a different name, worked a different time slot, and did not "capitalize on the image of the radio personality developed for her" at the first station.[7] On the other hand, courts have found such provisions enforceable based on the facts of each particular case when they are reasonably limited as to scope, time, and geography.[8]

Simply put, Commission action is not necessary to prevent unreasonably restrictive contract provisions because those provisions are generally unenforceable. By its very terms, however, the NPRM proposes to ban *all* non-compete provisions, including *reasonable* non-compete provisions that courts would find enforceable today. This approach is overbroad and

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[6] *Richmond Brothers, Inc. v. Westinghouse Broadcasting Co., Inc.*, 256 N.E.2d 304 (Mass. 1970).

[7] *West Group Broadcasting, Ltd. v. Bell*, 942 S.W.2d 934 (Mo. Ct. App. 1997).

[8] *Pathfinder Comms. Corp. v. Macy*, 795 N.E.2d 1103, 1113 (Ind. Ct. App. 2003).

unduly restrictive of reasonable non-competes that protect legitimate employer interests, such as broadcasters' interest in protecting their promotional investment in on-air talent.

The FTC asks in the NPRM whether, as an alternative to an outright ban of all non-compete provisions, the Commission could potentially adopt disclosure requirements related to non-compete clauses.[9] NAB has no objection to a rule that requires employers to disclose non-compete provisions to potential employees in advance of the commencement of employment. This would help ensure that potential employees who might object to non-compete provisions are able to make informed decisions about whether to accept an employment offer that is subject to such provisions.

For these reasons, if the Commission moves forward with its proposal to ban non-compete clauses generally, it should include an exception for broadcasters' on-air talent. Broadcasters make significant investments in promoting this talent, which appreciably builds the brand and market power of the employee. Broadcasters cannot protect this investment through other means suggested in the NPRM, as their investment is ongoing. Finally, and crucially, courts would continue to evaluate non-compete provisions for reasonableness to determine if they are enforceable. We urge the Commission to adopt an exception for broadcasters to any categorical ban on non-compete clauses.

III. THE FTC'S PROPOSAL IS OVERBROAD

A. The FTC Lacks Legal Authority to Ban Non-Compete Provisions

As an initial matter, the Commission does not have authority to ban non-compete provisions as "unfair methods of competition" because the FTC Act does not provide authority for competition rulemaking. The NPRM proposes to establish new rules pursuant to Sections

[9] NPRM at 154.

5 and 6(g) of the FTC Act. But section 5 of the FTC Act grants the Commission authority to pursue only individual enforcement actions against unfair methods of competition.[10] Section 6(g), meanwhile, only authorizes the FTC to develop internal procedural rules.[11] Neither section authorizes the Commission to promulgate generally applicable substantive rules regarding unfair methods of competition.

Further, the question of whether a particular non-compete provision is reasonable, and thus enforceable, has traditionally turned on a fact-specific inquiry regarding the precise terms of the provision and the contract in question. In some cases, employers have sought to impose plainly unreasonable non-compete provisions – including some provisions the FTC cites in its NPRM. NAB agrees that unreasonable non-compete provisions, perhaps including one cited in the NRPM where a sandwich chain sought to prohibit employees from working at another sandwich shop within three miles of any of the chain's 2,000 locations for two years – should be unenforceable. But Commission involvement is not necessary to void such patently unreasonable restrictions; indeed the sandwich chain in question abandoned the use of non-compete agreements in its hiring packets as part of a settlement following an investigation by the New York Attorney General's office.[12] A categorical ban on all non-compete provisions would forbid even reasonable contract terms in an effort to address

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[10] 15 U.S.C. § 45.

[11] 15 U.S.C. § 46(g).

[12] Office of the Att'y Gen. of the State of N.Y., *A.G. Schneiderman Announces Settlement With Jimmy John's To Stop Including Non-Compete Agreements in Hiring Packets*, Press Release (June 22, 2016) available at: https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-settlement-jimmy-johns-stop-including-non-compete#:~:text=NEW%20YORK%20%E2%80%93%20Attorney%20General%20Eric,it%20sends%20to%20its%20franchisees.

abusive non-competes that are already likely to be found unreasonable and thus unenforceable.

B. The FTC Should Adopt Exceptions for Executives and Highly Compensated Staff

Beyond the specific exception for broadcasters' on-air employees, the FTC should not ban non-compete provisions for senior executives or highly compensated sales staff. The FTC lacks a basis for banning non-compete provisions for such employees, and the Commission's stated policy concerns regarding senior executives and highly compensated staff do not apply to the broadcast industry.

First, station executives and certain highly compensated staff benefit from a significant investment in training and development. The FTC itself acknowledges that "there is evidence that non-compete clauses increase employee training and other forms of investment."[13] If the Commission bans the use of non-compete provisions entirely, broadcasters may decrease their investment in their staff, which would certainly not benefit their employees.

At the same time, senior executives and highly compensated staff are more likely to be able to negotiate favorable terms in employment contracts and are thus better able to protect themselves against unreasonable contractual provisions. The FTC acknowledges that non-compete clauses for highly paid workers are less likely to be exploitative and coercive than similar clauses for lower-wage workers.[14] Further, the NPRM expressly states that the Commission's findings that non-compete clauses are exploitative and coercive at the time of contracting do not apply to senior executives. The Commission should allow these individuals to negotiate the terms of their employment contracts with their employers.

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[13] NPRM at 45.

[14] *Id.* at 122.

Second, the FTC's stated policy concerns regarding the use of non-compete provisions for senior executives and highly compensated staff do not apply to the broadcast industry. In particular, the NPRM states that non-compete provisions for executives and highly paid employees may restrict competition by hampering new business formation or interfering with new competitors.[15] But this concern carries much less force with respect to broadcasting, a mature and highly regulated industry where the business model and revenue streams are generally well understood, and opportunities for new entrants are constrained by regulatory and technical factors that limit the potential number of stations in a given market. The primary obstacle to new entrants in such an industry is less likely to be the availability of staff or executives and more likely to be access to capital to invest in a mature industry that is subject to extensive regulation, rather than a less regulated and potentially higher growth emerging industry. Stated differently, the Commission cannot reasonably assume that broadcast employees departing one broadcast station will launch a competing station.

For example, in 2022, the Federal Communications Commission's auction of construction permits for new full power television stations closed with only 18 out of 27 construction permits successfully auctioned.[16] Similarly, in 2021, the FCC's auction of construction permits for AM and FM broadcast stations closed with only 97 out of 139 construction permits successfully auction.[17] There is no evidence that there is rampant interest in broadcasting by potential new entrants held back only by the challenge of

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[15] *Id.* at 123.

[16] *Auction of Construction Permits for Full Power Television Stations Closes*, Public Notice, DA 22-659, 2022 FCC LEXIS 1994 (June 23, 2022).

[17] *Auction of AM and FM Broadcast Construction Permits Closes*, Public Notice, DA 21-983, 36 FCC Rcd 12478 (Aug. 12, 2021).

attracting employees. On the contrary, the facts appear to demonstrate a ceiling on the level of interest in entering the broadcast industry.

C. The FTC Should Clarify Its Proposal for Banning "De Facto" Non-Competes

The FTC should ensure that its final rule makes express that non-compete provisions providing for exclusivity during the term of an employee's contract remain enforceable, and also provide greater clarity regarding contract terms the Commission will deem *de facto* non-compete provisions to minimize uncertainty for employers and employees seeking to understand and comply with the rule.[18]

Section 910.1(b)(1) and (2) of the Proposed Rule includes other restrictive covenants that are "unusually broad in scope" within the definition of a non-compete clause.[19] These clauses would be deemed *de facto* non-compete clauses if they have "the effect of prohibiting the worker from seeking or accepting work with a person or operating a business after the conclusion of the worker's employment with the employer."[20] The Proposed Rule provides two examples of what might be considered "de facto" non-compete provisions: an NDA that effectively precludes a worker from working in the same field after conclusion of the worker's employment; and a provision requiring workers to repay training costs that are not reasonably related to the costs the employer incurred.[21] The NPRM stresses, however, that these

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[18] The NPRM indicates an intent that the proposed rule cover only post-employment restraints and not restrictions on what an employee may do during the term of the agreement, and the language of the proposed rule should make this plainly clear. *See* NPRM at 107 ("The Rule would not apply to concurrent-employment restraints—*i.e.*, restrictions on what the worker may do during the worker's employment.").

[19] *Id*. at 109

[20] *Id*. at 107.

[21] *Id*. at 110.

examples constitute a non-exclusive list and that contractual terms "other than NDAs and TRAs may also constitute *de facto* non-compete clauses, depending on the facts."[22]

While such examples are helpful, absent further clarification on the scope of what may be considered a *de facto* non-compete clause, employers and employees will be left to grapple with whether other common and non-controversial provisions in employment agreements that bear on how the employment relationship may be extended or end remain enforceable. This would needlessly create uncertainty and increase the costs of compliance. In particular, the FTC should clarify that other contractual terms, including rights of first refusal, rights to match, and exclusive negotiating windows that are commonly used by broadcasters and other employers to protect their investment, but do not impede employees' ability to seek and obtain employment on better terms elsewhere after their employment ends, remain enforceable and would not constitute *de facto* non-compete provisions.

This clarification would be consistent with the FTC's stated intention of targeting only post-employment restrictions and its overall justifications for the Proposed Rule.[23] These contractual terms simply do not implicate the harms the Commission seeks to prevent because they do not restrict opportunities for employees after their employment ends, impede innovation, or depress wages.[24] If an employer and employee cannot reach an agreement on the terms of a new contract at the conclusion of an exclusive negotiating window or an employer is unable or unwilling to match the terms of a competitor's offer, the employment relationship will conclude at the expiration of the employment term and the

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[22] *Id*.

[23] *Id*. at 107.

[24] *Id*. at 72-87 (outlining FTC's view on the harms associated with non-compete provisions).

employee is free to take a job at a competitor. These provisions merely facilitate an opportunity for an employer to negotiate for and/or match improved terms that an employee demonstrates it can obtain in the market if the employer wishes to extend the term and retain the value of their investment. Extended employment on better terms is beneficial for both the employer and the employee and consistent with the NPRM's description of a "well-functioning labor market" in which a worker's "current employer may also compete with [any] prospective employers by seeking to retain the worker—for example, by offering to raise the worker's pay or promote the worker."[25] Absent clarification, employers could be deterred from including common contractual provisions that achieve such a win-win, and do not implicate the FTC's stated policy concerns, based on the potential threat of an FTC investigation or enforcement action. The FTC should make it clear that such contract terms will remain enforceable under the Proposed Rule.

IV. THE FTC LACKS AUTHORITY AND JUSTIFICATION TO RETROACTIVELY INVALIDATE EXISTING NON-COMPETE AGREEMENTS

The FTC must modify the Proposed Rule so that it applies only on a prospective basis. As discussed below, the Commission lacks authority to impose a blanket ban on non-compete provisions, much less the express statutory authority necessary to make its Proposed Rule apply retroactively.[26] In a marked departure from existing state legislation restricting the use of non-compete agreements, the Proposed Rule would not only ban employers from entering into non-compete agreements after the effective date of the requirement, but also retroactively invalidate pre-existing non-compete agreements, upsetting the substantial

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[25] *Id.* at 74.

[26] *See Landgraf v. Usi Film Prods.*, 511 U.S. 244, 270 (1994) ("Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent.")

interests of employers and employees in existing contracts and imposing additional costs and burdens on employers that are both unauthorized and unjustified. Specifically, the Proposed Rule requires employers to rescind existing non-compete agreements with current and former employees and provide individualized notice to current and former employees that their non-compete clause is no longer in effect and cannot be enforced.[27] The NPRM appears to acknowledge that the Commission lacks authority to impose retroactive rules and thus baldly claims that "[p]roposed § 910.2(a) would not apply retroactively."[28] However, given that the Proposed Rule "attaches new legal consequences to events completed before" the Proposed Rule's compliance date by rendering contract provisions that were negotiated and paid for invalid, there is no reasonable argument that the FTC's rescission requirements do not constitute an impermissible retroactive application.[29]

In addition to being unlawful, the Proposed Rule's rescission requirements will dramatically increase the costs of compliance for employers and will deprive employers of the benefits of their privately negotiated bargain without compensation. The FTC's suggestion that the recission requirement imposes minimal costs because the Proposed Rule provides safe harbor notification language[30] ignores the fact that in many cases, employees agreed to non-compete provisions in employment or separation agreements in exchange for compensation

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[27] *See* NPRM at 123-127 (describing rescission and notification requirements).

[28] *Id*. at 120.

[29] *Landgraf*, 511 U.S. at 270 (describing test for determining whether legislation operates retroactively).

[30] *See* NPRM at 127-128 (describing safe harbor for compliance with the recission requirement). The Proposed Rule's model language includes a statement that the "FTC's new rule does not affect any other terms of your employment contract." However, as discussed above, many non-compete agreements do not constitute mere boilerplate and thus it will be likely that the FTC's rule will result in complex negotiations over other terms of employment agreements that were bargained for in exchange for the employee's non-compete agreement.

or other favorable terms that would not have otherwise been received. Employers will therefore need to incur significant additional costs to renegotiate such agreements with both existing and former employees to account for the fact that their non-compete provisions are now void. Moreover, the Proposed Rule provides no guidance for how employers would be able to recoup consideration that has already been paid to current or former employees in exchange for their non-compete agreements. As numerous commenters point out, this raises significant constitutional questions, increases the costs of compliance, and may result in employers becoming embroiled in litigation with current and former employees regarding whether other terms of their agreements are unenforceable in absence of the non-compete for lack of consideration.[31] The serious legal questions and practical implications the Proposed Rule's rescission requirements raise highlight the flaws in the FTC's overall approach. The FTC must apply any restrictions on non-competes only to those agreements entered into after the Proposed Rule's compliance date.

If the Commission ultimately adopts any version of the Proposed Rule, at a minimum it should give employers adequate time to come into compliance. The Proposed Rule provides

[31] *See, e.g.*, Comments of District of Columbia Hospital Association, FTC-2023-0007-11591, at 4-5 (March 29, 2023) (explaining that FTC lacks authority to invalidate existing private contracts and that doing so would create "legitimate constitutional doubts under the Takings Clause because the FTC would be appropriating services by employees not yet rendered – namely their agreement not to compete – even though those services had already been paid for."); Comments of American Hospital Association, FTC-2023-0007-8138, at 4-5 (Feb. 22, 2023) (same); Comments of Akerman LLP, FTC-2023-0007-10571, at 4-5, 10 (March 22, 2023) (explaining that the rescission requirement "would result in the necessary renegotiation of separation agreements entered into with current and former workers under which such employees are entitled to contractual payments in consideration, in whole or in part, for restrictive covenants" and that the proposed rule "should remove the obligation to rescind former agreements or, at a minimum, lay out what recourse is available for employers who paid valuable consideration for inclusion of such provisions.").

only six months for employers to comply with the rules.[32] In that time, employers will need to negotiate changes to existing contracts, modify their contract policies and business procedures to ensure their interests are adequately protected, and provide individualized notice to both current and former employees of significant changes to their contracts. This work will be especially burdensome for smaller broadcasters, that operate on limited budgets and staff. Given the time and expense involved with the compliance requirements, employers should be given one year, rather than six months to comply with the Proposed Rule.

V. CONCLUSION

Broadcasters have a unique relationship with their on-air employees, who may come to serve as the face of the station in the market and be essentially synonymous with the brand of the station. Broadcasters make significant promotional investments in their on-air employees to build the employees' – and by extension the stations' – brand and goodwill in a given market. Because these investments are ongoing, and not subject to protection by other contractual provisions, broadcasters have a legitimate interest in protecting the value of their brands through reasonable non-compete provisions that prevent on-air employees from immediately jumping to competing stations in the same market. For these reasons, the FTC should adopt a limited exemption for broadcasters' use of non-compete provisions for their on-air employees.

The FTC should also clarify that a ban on "de facto" non-compete provisions would not affect reasonable contractual terms that provide rights to match, exclusive negotiating windows, or rights of first refusal during the term of an employment contract. These provisions do not implicate the Commission's stated policy concerns regarding suppression of wages or

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[32] *See* § 910.5 (requiring compliance 180 days after date of publication of the final rule).

competition. Finally, the FTC lacks legal authority to ban non-compete provisions retroactively, and as a policy matter the FTC should not upset parties' settled expectations in their existing contracts.

Respectfully submitted,

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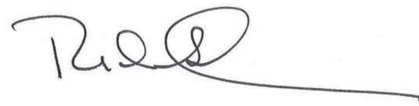

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